

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SUBSTANTIAL
DEVELOPMENT PERMIT ISSUED BY
CLALLAM COUNTY TO THE
PORT OF PORT ANGELES,

QUILCENE ASSOCIATES,

Appellant,

v.

CLALLAM COUNTY and
THE PORT OF PORT ANGELES,

Respondents.

SHB No. 82-8

PROTECT THE PENINSULA'S FUTURE,
FEDERATION OF WESTERN OUTDOOR
CLUBS, SEATTLE AUDUBON SOCIETY,
WASHINGTON ENVIRONMENTAL COUNCIL,
and QUILCENE ASSOCIATES,

Appellants,

v.

THE PORT OF PORT ANGELES
and CLALLAM COUNTY,

Respondents.

SHB No. 82-7

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the request for review of a substantial development permit issued by Clallam County to the Port of Port Angeles, was brought before the Shorelines Hearings Board, David Akana (presiding), Gayle Rothrock, Nancy Burnett, Art O'Neal and Rodney Kerslake, in Lacey, Washington on June 21-25, 28, July 7-9, 15, 16, 19-23, 26 and 27, 1982.

Appellants Quilcene Associates appeared by their attorney, William Lynn; the other appellants appeared by their attorney, Janet Quimby. Respondent Port of Port Angeles appeared by its attorneys, Stephen E. Oliver and Bart G. Irwin. Respondent Clallam County appeared by Deputy Prosecuting Attorneys Craig Knutson and Michael Chinn.

Having heard or read the evidence, having examined the exhibits, and having considered the posthearing proposed findings and conclusions offered by the parties, and being fully advised, the Shorelines Hearings Board makes these

FINDINGS OF FACT

1. Protect the Peninsula's Future is a nonprofit corporation which has as one of its purposes to ensure the best land use of the land and resources of the north Olympic Peninsula.
2. The Federation of Western Outdoor Clubs is a nonprofit corporation with membership in several western states. Its purpose is the mutual service and promotion of the proper use, enjoyment and protection of America's scenic wilderness and outdoor recreation resources.
3. The Seattle Audubon Society is a nonprofit corporation which has as its primary purpose the conservation of wildlife and the life support systems in the natural environment.
4. The Washington Environmental Council is dedicated to the promotion of citizens legislative and administrative action toward providing a better environment. By order of the Shorelines Hearings Board on June 22, 1982, the Washington Environmental Council was granted leave to intervene in these proceedings.
5. Quilcene Associates is a partnership which owns property used for residential, recreational and commercial shellfish harvesting on the shoreline of Sequim Bay.
6. The Port of Port Angeles is a municipal corporation and is the project sponsor of the proposed Sequim Bay Marina.
7. Clallam County is the local government having jurisdiction over the shoreline of Sequim Bay. Through its Board of County Commissioners, Clallam County issued substantial development permit number 81-21 to the Port of Port Angeles for development of the Sequim Bay Marina.
8. Sequim Bay is an embayment situated in Clallam County, adjoining the waters of the Strait of Juan de Fuca. The entrance channel to the bay is 700 to 900 feet wide. The bay is approximately 4.5 miles long and 1 to 1.5 miles wide.
9. The waters of Sequim Bay below extreme low tide are a "shoreline of statewide significance" pursuant to the State Shoreline Management Act (RCW 90.58). A small triangular portion of the breakwater lies below extreme low tide. The balance of the project is located on "shorelines of the State" as that term is defined in the Shoreline Management Act.
10. The bay presently supports substantial recreational activity, including boat traffic of approximately 12,000 trips per year and over 800,000 visitations per year to Sequim Bay State Park.
11. The Port of Port Angeles proposes to develop a marina and related facilities at Pitship Point, on the west shore of Sequim Bay.

12. The objectives of the proponent are:

a. To provide a moorage facility for non-trailerable boats adequate to meet existing and reasonably anticipated demands for such facilities in eastern Clallam County.

b. To provide facilities through which citizens may take advantage of the water-related recreational opportunities available upon the relatively protected waters east of Dungeness.

c. To provide additional shoreline related recreational amenities which are compatible with the objectives above set forth and the shoreline environment.

13. The Pitship Point site has a history of use as a marina facility and has been substantially altered in the past by dredging, filling and construction of a spit extending approximately 500 feet into the bay.

14. Under a U. S. Army Corps of Engineers permit issued in April, 1960, approximately 5 acres of fill was placed on the original beach face and inter-tidal flats. A spit-shaped point of land, approximately 60 to 90 feet wide and extending 500 feet into Sequim Bay was constructed. Remnants of a previous marina operation known as Sequim Bay Marina, including pilings and launching ramp, are located north of the spit. The marina itself was constructed under a Corps of Engineers permit issued in June of 1969, and was abandoned soon thereafter.

15. The evidence does not indicate the existence of any other site in the region which has been substantially altered or which has a history of use as a marina.

16. Current public use of the Pitship Point site includes boat launching and recreational clam harvesting. The proposed marina will eliminate the public boat launch. Depending upon the amount and nature of boat traffic, the public clam beach will likely be uncertifiable or otherwise unsafe for recreational harvesting.

17. To form the wet moorage basin and access channel, 11.8 acres of tidelands and 1.2 acres of uplands, including the existing manmade spit, will be dredged to depths of 8 to 13 feet below mean lower low water (MLLW). The total amount of material removed will be about 240,000 cubic yards, with an average excavation depth of 10 feet in the tideland area. About 79,000 cubic yards will be placed waterward of mean higher high water (MHHW), creating 4.4 acres of uplands at an elevation of 20 feet above MLLW. The remaining 54,000 cubic yards will be placed on 4.6 acres of existing uplands. Approximately 107,000 cubic yards of tideland material which cannot be used on site will be dredged by clamshell and taken by barge to a deepwater disposal site. The location, site vicinity, and development plan are as set forth in the figures on pages 3, 4 and 6 of the Final Environmental Impact Statement (hereinafter "FEIS").

18. The marina will include 422 permanent and 22 transient wet moorage berths, and dry storage for an additional 104 boats. Accessory facilities, including offices and parking areas, will also be constructed. Additionally, the Port plans to provide a public beach, picnic area, fishing pier, and a conservancy beach as part of the proposal. Johnson Creek, which flows across the south portion of the site, will be relocated into a channel along a proposed rock breakwater.

19. To provide vehicular access to the marina, a new road between SR 101 and the marina in the vicinity of Johnson Creek will be constructed, or substantial improvements to old Olympic Highway will be undertaken. A plan for financing of such road improvement is included in an Interlocal Governmental Agreement between Clallam County and the Port District.

20. Landscaping will be used to reduce the visual impact of paved parking lots and to screen utility equipment.

21. The principal land uses in the vicinity are rural, recreational, and forest lands. Immediately west of Pitship Point, across Old Olympic Highway, is a resort and recreational vehicle park.

22. Sequim Bay and adjacent waters provide habitat for diverse species of wildlife and other biological resources.

23. Following public hearings, the Clallam County Shorelines Advisory Committee unanimously recommended approval of the shoreline substantial development permit application subject to conditions. It adopted Findings of Fact and recommended approval of the application to the Board of Clallam County Commissioners.

24. The Board of County Commissioners did not conduct a public hearing and was not required to do so.

25. Commissioner Don Feeley allowed a pro-marina button to be pinned on him at a hearing that occurred prior to his becoming a Commissioner and approximately 9 months before the receipt of a shoreline permit application for a specific marina project.

26. The Board of Clallam County issued the subject permit on January 12, 1982. On the same date, the Port of Port Angeles and Clallam County entered into an inter-local governmental agreement for the possible development of improved vehicular access to the marina.

27. The record considered by the Shoreline Advisory Committee includes the permit application, the FEIS including all comment letters and technical appendices, public testimony at hearings, written comments from interested parties, responses to inquiries of the county by technical consultants, the application's analysis by the appropriate county departments, and all other information presented in a timely fashion for consideration by the Advisory Committee.

28. State of Washington Department of Fisheries (WDF) and Department of Game have issued a hydraulics permit, subject to conditions, for the project (Exhibit R-3). These agencies, together with the State Department of Natural Resources, have entered into a mitigation agreement with the Port regarding various topics.

29. Clallam County has issued a sewage disposal permit for the project which is not challenged in this appeal.

30. No state or federal agency presented testimony or evidence to the Board indicating opposition to the project.

31. The State of Washington Department of Ecology (DOE) indicated support for the project in a letter, and agreed with the selection of the Pitship Point site. DOE also indicated a preference for development of this proposal over the "no action" alternative.

32. The parties stipulated that:

a. The substantial development permit issued by the County was for a project which was not substantially changed from the project which was the subject of the Port's FEIS and the Port's action amending the Comprehensive Plan of Harbor Improvements to include the project.

b. There are no significant issues within the jurisdiction of the Board pertaining to:

i. The impact of the proposal upon terrestrial mammals;

ii. The impact of the proposal upon terrestrial vegetation, except the Lowland Avalanche Lily;

iii. The proposed septic tank and drain field system for the marina proposal;

iv. The impact upon air quality.

33. The record contains substantial evidence adequately demonstrating a need for a moorage facility of the kind proposed to meet both existing and reasonably foreseeable future demand for such facilities in the region.

34. The most conservative opinion of near future demand submitted by any qualified witness was to the effect that the marina, if built, would be fully occupied by 1991-1996. Other testimony and exhibits provided substantially greater estimates of existing and future need or demand for the project.

35. The projected moorage rates for the facility (\$2.50 - 3.00 per foot), if achieved, would generate a reasonable rate of return on the Port's investment and are suited to near future market conditions.

36. During the initial years of operation, the marina will likely require a subsidy of public funds. The projected cost of operation exceeds the market limit moorage rate and full occupancy will require several years to achieve. Full utilization of the marina will not result for that time while the impact and loss of some aquatic life will be immediate.

37. Public service costs will be offset, to some extent, through the County share of leasehold tax and increased sales tax revenues. Further, the agreement between the County and Port of Port Angeles will provide funding to offset road impacts.

38. The fishing grounds east of Dungeness Spit can be accessed by existing boat launch ramps at Dungeness, Port Williams, Sequim Bay State Park, Pitship Point, and at Gardner on the west shore of Discovery Bay.

39. There are presently no public marina facilities between Port Angeles and Port Townsend, a distance of 30-40 miles.

40. There is evidence of a need for a moorage facility to provide a harbor of refuge between Port Angeles and Port Townsend.

41. The proposed marina does not offer substantial benefit to the general public. The marina launch facilities will not be available to the general public and the proposal does not include a trailer launch ramp. The project would afford minimal benefit to the 90% of boat owners in Clallam County who own trailerable boats.

Experience at the Port Angeles marina indicates that wet moorage slips will not be generally available to the public but will become like rental property of the original tenants, and transferable with the sale of their boats. The proposed picnic and public beach areas of the project will not be comparable to existing recreational opportunities because of parking limitations, potential pollution of the clam beds, and diminishment of the use of the site by waterfowl.

Boater destinations outside of Sequim Bay are relatively limited due to the distance from Sequim Bay to the San Juan Islands. Additionally, public access is discouraged at many of the nearest destinations including Protection Island, Washington Harbor, and Dungeness Spit because of significant wildlife resources.

Because as many as 114 slips in the marina will be utilized by commercial boats, recreational opportunities will be further limited.

42. Sequim Bay has water quality classification, Class AA "Extraordinary", under the Department of Ecology regulation, WAC 173-201-045. The following water quality standards apply:

a. Fecal coliform organisms shall not exceed a median value of 14 organisms per 100 ml, with not more than ten percent exceeding 43 organisms per 100 ml.

b. Dissolved oxygen shall exceed 7.0 mg/l except when the natural phenomenon of upwelling occurs. Natural dissolved oxygen levels can be degraded from 0.2 to 0.5 mg/l by man-caused activities under different conditions.

c. Water temperatures shall not exceed 13.0 C due to human activity. When natural conditions exceed 13.0 C, no temperature increase will be allowed that will raise the receiving water temperature by greater than 0.3 C.

d. Toxic, radioactive, or deleterious material concentrations shall be less than those that may affect public health, the natural aquatic environment or the desirability of the water for any use.

e. Aesthetic value shall not be impaired by the presence of materials or other effects, excluding those of natural origin that offend the senses of sight, smell, touch, or taste.

43. The flushing characteristics of Sequim Bay are adequately analyzed in the FEIS and its Technical Supplement.

44. Although the record reflects a disagreement among experts as to methodology which could be employed in investigating the flushing characteristics of the marina basin and the bay, no substantial evidence was presented indicating that the conclusions reached in the FEIS were in fact wrong.

45. The design of the marina allows the basin to maximize flushing and circulation. Water quality inside the marina basin will probably not be significantly affected; a wide variety of marine life is expected to thrive, and aquaculture (pen rearing) could be introduced. The breakwater slope will conform to WDF criteria.

46. Sequim Bay has been historically used for the harvesting of shell fish resources, primarily of oysters and little neck clams. The Pitship Point site contains a disturbed archeological site documenting 2200 years of use by man of its shellfish.

47. Approximately 75% of the total state little neck clam production is harvested from Sequim Bay and Discovery Bay, of which the harvest in Sequim Bay is 40% to 50%. Almost the entire east side of Sequim Bay and portions of the west side of Sequim Bay are commercially harvested at the present time.

48. The intertidal area harvested averages from two foot plus to four foot low tide with an average width of approximately 35 feet. The beds closer to the channel and mouth of Sequim Bay, including Middle Ground are the most productive because of the increased water action over the beds.

49. Pitship Point, the site of the proposed marina, is itself an excellent clam bed. At the south end of Sequim Bay, oysters are grown through seeding. The operator, Dave Johnston, anticipates harvesting 6,000 bushels of oysters this year.

50. The Jamestown Klallam Tribe has utilized Sequim Bay as its traditional and customary fishing grounds. The tribe is developing land at the south end of the bay near the mouth of Jimmie Come Lately Creek for salmon pens and terminal fishing, and at the southeast end of the Bay for oyster culture. Use of the salmon pens will begin in May of each year and continue for up to six months. Oyster culture is a year round operation.

51. The commercial production of little neck clams from Sequim Bay from the Johnson and Gunstone operation have been:

1978	40-50% of 256 thousand pounds
1979	40-50% of 141 thousand pounds
1980	40-50% of 341 thousand pounds
Through October 1981	40-50% of 291 thousand pounds

52. Little neck clams averaged \$1.49 a pound in the retail market in the summer of 1982. The average commercial yield in Sequim Bay is one pound per square foot annually.

53. Little neck clams require a cooler water temperature than Japanese little neck--Manila clams, and are more sensitive to water pollution. Clean water and pristine beds are important marketing factors.

54. Sequim Bay also provides excellent recreational shellfish harvesting, including the Pitship Point site and Middleground.

55. The development of the Marina will result in the loss of at least 1.3 acres of dense clam beds. About five percent of the total spawning area in the bay will be destroyed by development of the Marina.

56. The Department of Social and Health Services (hereinafter DSHS) does not certify areas around marinas and the boat traffic corridor, or where boats are rafted. The size of the decertifiable area is determined on a case by case basis depending upon the size of the boat corridor or the volume of boat traffic. Possible contamination from the discharge of sewage is the major factor behind this policy.

57. Boat traffic associated with the marina will cause the corridor between Pitship Point and mouth of the bay to be uncertifiable for commercial shellfish harvesting throughout the year. The area is presently uncertifiable from May to September. This corridor contains intertidal hardshell clam beaches owned principally by Batelle Marine Research Laboratory and subtidal hardshell and geoduck beds owned by the State. These areas are not commercially harvested at the present time. DSHS has not indicated that any other portion of the bay will be subject to decertification if the marina is built.

58. A 5.8 acre clam bed immediately south of the marina may not be available for recreational harvest depending upon the potential for fecal contamination from boats using the marina.

59. The clam beds which would be uncertifiable year-round include state owned subtidal hardshell clam beds in the vicinity of Middleground, State owned geoduck beds south of Middleground, privately owned intertidal hardshell clam beds at Middleground and along the shoreline west and northwest of Middleground and the Pitship Point intertidal hardshell clam bed beach owned by the Port of Port Angeles. In addition, there is a potential to lose other harvestable areas.

60. Construction of the proposed marina would increase the possibility of decertification of existing commercial shellfish growing areas in the bay due to rendezvousing of boats near those commercial growing areas.

61. DSHS has indicated that if the marina caused vessels to "rendezvous" in the vicinity of commercial clam beds, closures of limited areas for up to two weeks could result. However, no closures or decertifications have been previously declared by DSHS due to "rendezvousing" anywhere in the State.

62. While the marina could create a "rendezvousing" problem, it is equally possible that the presence of the marina could reduce the possibility of such activity by providing a haven for transient vessels.

63. The operations of commercial harvesters would not be substantially disrupted by short-term closures due to "rendezvousing" even if they occurred. Harvesting crews do not operate on all beds all the time, and harvesting could continue in other areas.

64. Rendezvousing of vessels has not been observed in the south end of the bay by bay residents.

65. Viruses, such as hepatitis, are associated with human sewage. The virus itself persists for some time in the water, and in shellfish, and can persist longer in cold water. There is no practical test for diagnosing or identifying the hepatitis virus in clam meat or in the water. The incubation period is from two to eight weeks for hepatitis.

66. Testimony was presented indicating the operation of the marina could increase the risk of humans contracting hepatitis from eating contaminated shellfish. However, no testimony was presented suggesting that such risk would be significantly greater than those which presently exist.

67. The fecal coliform counts for Sequim Bay have increased over the past three years. The sampling year, November 5, 1979, through October 28, 1980, represented the first year that a significant number of samples (19) had fecal coliform levels above the upper limit (230 mpn) as set by the public health service under the National Shellfish Sanitation Program for the marketing of fresh and frozen oysters. Potential sources of existing fecal coliforms include the City of Sequim sewer outfall, dairy farms near the bay, improperly functioning septic systems, and existing boat traffic.

68. Potential "worst case" pollution conditions for hydrocarbons and human sewage generated by boat traffic were examined in the FEIS and in the testimony. The current and flushing patterns of the bay will adequately disperse pollutant accumulations.

69. Shellfish retain coliforms and other infectious organisms so that concentrations in the shellfish may be higher than in the water column. (Class AA waters: 13/100 ml; shellfish up to 230 mpn/100mg clam meat are permissible.)

70. Clams which are harvested from uncertifiable beds can be rendered marketable through the process known as "relaying." This process requires moving harvested clams to clean, certifiable waters and holding them there for two weeks before marketing.

71. Batelle apparently has no immediate interest in harvesting its clam beds.

72. Geoducks are fully amenable to "relaying" and would suffer no significant mortality or product loss through that process.

73. Little neck clams can also be relayed; however, some product loss (approximately 5%) could be expected and shelf life might be reduced if clams were held for the required two week period.

74. Charles Gunstone, who harvests little neck clams commercially from 14 miles of intertidal beaches in Sequim and Discovery Bay, has occasionally relayed little neck clams harvested in Sequim Bay for 24 to 72 hours as part of his operation. Relaying for two weeks would reduce the probability that his clams could be sold "fresh," thereby reducing their value by several cents per pound.

75. Decertification of existing commercial operations is not expected to result from marina construction or operation. If private or State commercial clam beds are in fact rendered uncertifiable by the project, all costs associated with "relaying" will be borne by the Port under the Mitigation Agreement (Exhibit R-1), and county permit conditions (Exhibit A-8).

76. Marinas successfully co-exist with commercial clamming operations at various locations in the Puget Sound region, including Liberty Bay (Poulsbo), Oakland Bay (Shelton), and near Pt. Roberts.

77. Impacts to fish and shellfish resources are minimized, to the extent practicable, both during construction and operation of the proposed marina and through proposed mitigation measures, as established in Section 3.9 of the Port's FEIS.

78. Impacts to existing hardshell clam beds at the project site are minimized by locating the proposed wet moorage basin as far north as possible at the proposal site. Mitigation measures are established as conditions to the shoreline development permit to minimize construction and operation effects of the proposed marina on existing hardshell clam resources within Sequim Bay.

79. A draft EIS for the current proposal was issued in November of 1980. A joint public hearing was held on the draft EIS for the purpose of receiving public input by the Port District and U.S. Army Corps of Engineers at Sequim on January 8, 1981. Following publication of the final EIS, the Port District held a further public hearing and received public and agency input on the proposal to amend the Port's Comprehensive Scheme of Harbor Improvements (RCW 53.20) to include the project on September 22, 1981. Following this hearing the Port adopted Resolution No. 525 on October 1, 1981, authorizing inclusion of the proposal in the Port's Comprehensive Scheme of Harbor Improvements and application for the subject shoreline permit. "Notice of Action" was published in The Daily News on October 13 and

20, 1981. In addition, a "Notice of Action" was posted on a gate about 100 feet within the boundaries of the site. The notice accurately described the action taken by the Port in its Resolution No. 525.

80. The information contained in the FEIS, prepared by the Port pursuant to SEPA, provides a full disclosure of potential environmental impacts of the proposal and is adequate to comply with the requirements of SEPA for this application.

81. Alternative sites and designs for a moorage facility in the area were thoroughly considered in the FEIS and rejected for reasons stated in the EIS by the applicant, either on the basis of environmental or engineering considerations, or cost restraints.

82. No substantial change occurred in the project during the permit process which would require the county or the Port to supplement the EIS. The construction of a new access road is a potential mitigation measure which is not a part of this permit application. As contemplated in the local Government Agreement, the decision of whether or not to build the road is a decision to be made in the future by the County, not the Port, which will be subject to SEPA review at that time.

83. The appellants' plan for expansion of the Port Angeles Boat Haven is not a reasonable alternative to meet the need identified for this proposal. The Port Angeles facility does not provide suitable access to the waters east of Dungeness or nearby moorage for the growing population of the Sequim-Dungeness Valley. It would also require the elimination of existing facilities, including a shipyard and fish processing plant. Potential expansion in Port Angeles was investigated by the Port District in the FEIS (Appendix G) and an expansion of the existing haven would not meet future demand.

84. The execution of mitigation agreements (Exhibit A-7 and R-1) during the environmental process was done for the purpose of providing specific measures to mitigate actual or perceived impacts. Those agreements are:

(a) Intergovernmental Agreement dated January 9, 1981, with the State Departments of Fisheries, Game and Natural Resources, pertaining to mitigation of potential impacts upon clam beds at the site, other commercial clam beds in the bay, eel grass, smelt and herring spawning areas as well as other matters addressed in the document;

(b) An Inter-local Governmental Agreement with Clallam County dated January 12, 1981, addressing the hearing of potential future costs of road improvements in the vicinity of the marina which agreement includes as an alternative mitigation the possibility of construction of a new road to serve the site.

85. Construction of the marina will destroy approximately 0.6 of an acre of eelgrass bed. The eelgrass to be lost constitutes a small impact upon the ecology of the bay.

86. An area approximately 0.1 of an acre in size near the mouth of Johnson Creek supports growth of pickleweed. This growth does not constitute a "saltmarsh" by either the usual biological definition of the term, or the definition of "marsh" in the Clallam County Shoreline Master Program (SMP). App. C-4. It also is not recognized as an "estuary" in the SMP. Section 16.D.5; App. C-4.

87. The establishment of a marina at the proposed site and boat traffic associated with it will not significantly impact migratory waterfowl, endangered or threatened species using the area, or other birdlife.

88. The Port Angeles Harbor supports an extensive and diverse bird population despite its urban and industrial character. Similarly, no substantial decrease in bird usage on Sequim Bay would be expected if the marina were built.

89. The positive public information program that will be coordinated with the U.S. Fish & Wildlife Service (FWS), and measures described in the FEIS at Section 3.9, will serve to reduce any potential impacts of the project upon wildlife resources at Dungeness, Graysmarsh, and Protection Island, as well as to reduce the potential for damage to commercial shellfish beds.

90. Sequim Bay is a significant wildlife habitat and is under consideration as a marine sanctuary site under the 1972 Marine Protection Research and Sanctuaries Act. It provides habitats important internationally as nursery, breeding, and feeding grounds for a number of ecologically and commercially important marine species. Sequim Bay is a candidate site for "sensitive area" designation by the Department of Ecology. The bay serves as resting and feeding grounds for birds from Graysmarsh and Dungeness wildlife refuges, Washington Harbor and Protection Island as well as migrating birds. These birds include the bald eagle and peregrine falcon as well as black brant. The site vicinity includes the black oyster catcher, rhinoceros auklet and the harlequin duck.

91. The proposed marina would generate over 33,000 additional boat trips per year. In comparison, the EIS estimates present traffic at approximately 12,000 boat trips per year. Navigation into the bay would not be impaired because of the increase in boat traffic. The increase in motorboat usage would significantly alter the present natural appearance of the bay.

92. The development of the marina will result in certain induced effects. The FEIS predicts that additional facilities, including a restaurant and residential units, may be developed on private property nearby the marina site.

The induced residential development will create demands for and be limited by available public services. The proposed marina will not provide all the services provided by boaters, such as food and

beverages, ice, fishing supplies, and boat repair facilities. Consequently, a restaurant and other commercial establishments providing these services would be likely to develop in this area. Additional conversion of land to recreational use can be expected after the marina is constructed.

93. The proposed marina would be located in a "suburban environment" designation. SMP, Section XVI; App. D. The suburban environment was created to protect certain areas from intensive urban and industrial development. By definition, such areas are intended primarily for single-family permanent or recreational residences. It is not regarded as presently or potentially a "natural" area. SMP, Section XVI.A.

94. In a suburban environment, access to the shoreline for the public through public and private facilities is encouraged. SMP, Section XVI.C.1, 4. Recreation and tourist use of such shorelines by providing access is promoted to stimulate economic development. SMP, Sections XVI.C.2, 4. Golf courses, beaches, marinas and boat launching ramps are some of the "preferred" uses in the suburban environment. SMP, Sections XVI.C.5. The resources in the suburban environment are to be neither preserved untouched nor destroyed forever. Rather, the resources and competing uses are to be "managed" to supply the county's needs at a sufficient quality and quantity in perpetuity. SMP, Section XVI.C.6. What is required by the SMP is "prime consideration" of the natural resources in actions taken on development applications. SMP, Section X.

95. The SMP allows aquaculture, recreation and marina activities within the suburban environment.

Aquaculture is given "priority" on appropriate shorelines; other uses are "encouraged" to locate elsewhere:

Potential locations for aquaculture enterprises are relatively restricted due to specific requirements for terrain features; water quality, temperature, flows, oxygen content; and in marine waters, salinity. Therefore, priority shall be given to aquaculture uses in shoreline areas having high potential for such use. Other uses having less restrictive requirements than aquaculture are encouraged to locate in areas unsuitable for aquaculture.

SMP, Section XVI.E.2.a. See also SMP, page 2 (III).

Marinas and boat launches are recognized as important public access portals to the waters of the state:

(a) Marinas and boat-launching facilities are the primary facilities through which the largest proportion of the public passes while participating in water-oriented recreational activities. Thus

adequate facilities of this nature should be provided in areas which may be easily and conveniently reached from major population centers for the benefit of both the local population and the people visiting from other areas of the state and nation. Such facilities should also provide convenient access to fishing and cruising areas and provide, or be capable of being developed to provide adequate protection from the elements to prevent destruction of property. Included within this over-all category are accessory activities such as emergency service facilities, transient moorage, holding-tank dumps, tackle shops and the like.

SMP, Section XVI.E.4.a. Although allowed, marinas and boat launches must minimize damage to fish and shellfish resources:

Marinas and boat launch facilities shall be designed to minimize, to the extent practicable, damage to fish and shellfish resources, both during construction and during operation.

SMP, Section XVI.E.4.e.

Public recreational facilities must be considered in the light of additional concerns:

Proposals for development of public recreational facilities shall consider at least the following factors:

- (1) The proximity of population centers;
- (2) The mix of desired recreational activities and the availability of such facilities (public and commercial, existing and planned) in the area to be serviced; and
- (3) The compatibility of the proposed development with surrounding areas and uses.

SMP, Section XVI.E.19.a. Related to the considerations made under that section is yet another involving marine beaches:

a. The only marine beaches in a Suburban Environment in Clallam County are those bordering Sequim Bay. The bay has 5.2 miles of mud beach and 4.3 miles of sand beach.

b. Marine beaches in the Suburban Environment on Sequim Bay are to be restricted to recreation uses, either public or private.

SMP, Section XVI.D.1.

Sequim Bay has waters with high potential for aquacultural uses. Because the SMP recognizes water quality as a prime goal of shoreline management, marinas and boat launches, which do not have specific water quality requirements, should go to areas unsuitable for aquaculture and away from Sequim Bay. On the other hand, the SMP restricts marine beaches¹ on Sequim Bay to public or private recreation uses. Marinas and boat launches, both recreational uses, are specifically allowed in Sequim Bay if properly designed, constructed and operated. The synthesis of these provisions involves not the total displacement of one use activity over another, but a balance between them.² The actual compatibility of the recreational uses is an important factor in achieving this balance. The SMP acknowledges this factor for marinas in Section XVI.E.4.e and for recreational uses in Section XVI.E.19.a. A marina in Sequim Bay must be designed, constructed and operated to be compatible.³ This is a continuing requirement under the SMP.

96. The SMP addresses shorelines of statewide significance in a general way in Appendix A. In contrast, the use regulations deal specifically with uses deemed appropriate on all shorelines. Those uses chosen on shorelines of statewide significance are presumed to have been selected in the following order of preference:

- a. Recognize and protect the statewide interest over the local interest;
- b. Preserve the natural character of the shoreline;
- c. Result in long term over short term benefit;
- d. Protect the resources and ecology of the shorelines;
- e. Increase public access to publicly owned areas of shorelines; and
- f. Increase recreational opportunities for the public on the shorelines.

SMP, Appendix A-1. Whether the instant development is a use selected in the order of preference set out above is certainly debatable. That is not to say the use selection was wrong, but that there is some difference of opinion. We note at the outset that neither the DOE or Attorney General has questioned the balance between the statewide and local interests or the long term and short term benefits made on this

1. Marine beaches are described in WAC 173-16-050(1).

2. The SMP, page 2, IX states: "It is the intent of this system to encourage uses in each environment that enhance the character of that environment and, at the same time, to place reasonable standards and restrictions on development so that such development does not disrupt or destroy the character of that environment."

3. See also RCW 90.58.020 (last paragraph).

development.⁴ However, the evidence does not persuade the Board to balance the interests differently. Second, Pitship Point, which has been both dredged and filled, is not a natural site. It would not be inconsistent with the SMP provision to allow a marina use at Pitship Point if the resources and ecology of the shorelines in Sequim Bay were protected. Third, public access to publicly owned areas of the shorelines should be continued in a manner to increase public recreational opportunities on the shorelines.

97. The SMP provision relating to landfill asserted to be relevant to this project is:

Landfill for the sole purpose of creating new land for multi-unit residential developments and non-water related uses shall not be permitted. For the purposes of this section use of a landfill for the purpose of transferring cargo from land-transportation to water-transportation models shall be considered a water-dependent use.

SMP, Section XVI.E.13.a.

The proposed development requires landfill in the water and on the shorelines at Pitship Point. The SMP provision for creating land by landfill is inapplicable to water related and water dependent uses such as the instant development.

98. The SMP provisions for dredging are relevant to this project:

a. Deposit of dredge-spoil will be approved at such sites and in such manners as will, to the extent feasible, minimize water turbidity, degradation of water quality and disruption of fish, shellfish and wildlife habitats.

b. Depositing of dredge materials in shoreline waters shall only be allowed for habitat improvement, to correct problems of materials distribution adversely affecting fish or shellfish resources and/or where reasonably available alternatives of land deposit are more detrimental to shoreline resources.

4. The role of the Department of Ecology in shoreline matters is set forth in the SMA. It includes approvals of master programs, ensuring compliance with the policy and provision of the SMA, and representing the state as the responsible agency for shoreline regulations. The Attorney General's role has a role of even larger dimension. Hama v. Shorelines Hearings Board, 85 Wn.2d 461, 467 (1975). The absence of these agencies in a case involving shorelines of statewide significance is conspicuous, but certainly not dispositive of the issue.

c. Dredging for the sole purpose of obtaining fill is allowed only after obtaining a Conditional Use Permit.

SMP, Section XVI.E.14.

The purpose of dredging in this project is to excavate a marina basin. The use of the dredge spoils as fill is not necessary to achieve the purpose of the project. Thus, a conditional use permit is not necessary.

The deposit of dredge spoils on the uplands must minimize, to the extent feasible, water quality degradation and disruption of fish, shellfish, and wildlife habitats. There is no evidence that adverse impacts to areas outside the project vicinity could be more feasibly minimized.

For this project, the deposit of dredge spoils in the water would be allowed only where reasonably available alternatives of land deposit are more detrimental than shoreline disposal. The county's decision was not shown to be wrong. Moreover, the proposed deposit of dredge spoils is to be contained within clean fill. This procedure should minimize adverse impacts to water quality and aquatic habitats.

99. Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings the Board comes to these

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the persons and subject matter of this proceeding.

2. In an appeal of any permit issuance, the party attacking the validity of such permit has the burden of proof. RCW 90.58.140(7).

3. The instant permit is tested for consistency with the Clallam County SMP and the provisions of the SMA. RCW 90.58.140(2)(b).

The proposed action is also reviewed for compliance with the requirements of the SEPA. RCW 43.21C.060.

4. RCW 43.21C.080(2)(a) provides in relevant part:
Any action to set aside, enjoin, review, or otherwise challenge any such governmental action for which notice [of action] is given . . . on grounds of noncompliance with the provisions of this chapter shall be commenced within thirty days from the date of last newspaper publication of the notice . . . or be barred: Provided however, That the time period within which an action shall be commenced shall be ninety days for projects to be performed by a governmental agency or to be performed under government contract . . . : Provided further, That any subsequent governmental action on the proposal for which notice [of action] has been given . . . shall not be set aside, enjoined, reviewed, or

otherwise challenged . . . unless there has been a substantial change in the proposal between the time of the first governmental action and the subsequent governmental action

5. For purposes of analyzing procedural matters raised under SEPA, the first "action"⁵ taken by any governmental organization with respect to the Sequim Bay Marina was accomplished by the Port of Port Angeles. The action proposed was the amendment to the Port's harbor improvement plan (chapter 53.20 RCW). Following the publication of a draft and final EIS, the Port approved the final EIS and used the document in its decision to amend its comprehensive scheme of harbor improvements. The amendment, formalized as Resolution No. 525, occurred on October 1, 1981. Publication of a "Notice of Action" under SEPA occurred on October 13 and 20, 1981, in a proper newspaper. A notice was also posted on the property on October 13. Appellants did not commence action to challenge the adequacy of the EIS or the Port's alleged noncompliance with SEPA within 90 days from October 20, 1981. Appellants instead seek to set aside the Port's action under chapter 53.20 RCW in a collateral proceeding against the Port and Clallam County under chapter 90.58 RCW. This type of attack does not avoid the bar of RCW 43.21C.080. In re Port of Grays Harbor, 30 Wn.App. 855 (1982). Furthermore, because there was no substantial change in the proposal between the time of the Port's action and the County's subsequent action, the bar is complete. RCW 43.21C.080(2)(a). 6. The SMA requires coordinated planning to prevent the inherent harm from uncoordinated and piecemeal development of the shorelines. The policy and implementation of the act to achieve coordinated development is set forth in RCW 90.58.020:

It is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses. This policy is designed to insure the development of these shorelines in a manner which, while allowing for limited reduction of rights of the public in the navigable waters, will promote and enhance the public interest. This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally public

5. WAC 197-10-040 includes governmental activity of a project and nonproject nature as an "action."

rights of navigation and corollary rights incidental thereto.

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In the implementation of this policy the public's opportunity to enjoy the physical and aesthetic qualities of natural shorelines of the state shall be preserved to the greatest extent feasible consistent with the overall best interest of the state and the people generally. To this end uses shall be preferred which are consistent with control of pollution and prevention of damage to the natural environment, or are unique to or dependent upon use of the state's shoreline. Alterations of the natural condition of the shorelines of the state, in those limited instances when authorized, shall be given priority for single family residences, ports, shoreline recreational uses including but not limited to parks, marinas, piers, and other improvements facilitating public access to shorelines of the state, industrial and commercial developments which are particularly dependent on their location on or use of the shorelines of the state and other development that will provide an opportunity for substantial numbers of the people to enjoy the shorelines of the state.

Permitted uses in the shorelines of the state shall be designed and conducted in a manner to minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area and any interference with the public's use of the water.

7. Development on shorelines is not prohibited. What is prohibited is uncoordinated, piecemeal development. The policy provides that developments which promote and enhance the public interest may be allowed to reduce public rights in the navigable waters to a limited extent.

The policy also contemplates protecting against adverse effects to, among other things, the wildlife and the waters and their aquatic life. The standard is not absolute, however. The physical and aesthetic qualities of natural shorelines are to be preserved "to the greatest extent feasible consistent with the overall best interest of the state."

The resolution between the twin goals of preservation and development is a system of "preferred" uses, such as ports, shoreline recreation uses (including marinas and other improvements facilitating

public access to the shorelines), and other developments that will provide an opportunity for substantial numbers of the people to enjoy the shorelines of the state. Nisqually Delta Association v. DuPont, SHB Nos. 81-8, 81-36, appeal docketed, No. 82-2-7665 (Thurston County Superior Court, June 1982); English Bay Ent. v. Island County, SHB No. 185, aff'd, 89 Wn.2d 16 (1977).

The instant proposed substantial development, a water dependent facility, is a preferred use. It is also a "priority" use specifically contemplated by the SMA. Accordingly, such development is authorized under the policy of the SMA on our natural shorelines where coordinated planning for reasonable, appropriate shoreline uses has occurred.

Such planning is evident through the adopted and approved Clallam County Shoreline Master Program (SMP). For the foregoing portion of the policy of the SMA, consistency with the SMP becomes the foremost issue.

8. The SMA describes two categories of shorelines of the state: "shorelines" and "shorelines of state-wide significance." RCW 90.58.030(c). The interest of all of the people is paramount in the management of shorelines of state-wide significance. In developing master programs for such shorelines, uses are preferred in an order which:

- (1) Recognize and protect the state-wide interest over local interest;
- (2) Preserve the natural character of the shoreline;
- (3) Result in long term over short term benefit;
- (4) Protect the resources and ecology of the shoreline;
- (5) Increase public access to publicly owned areas of the shorelines;
- (6) Increase recreational opportunities for the public in the shoreline;
- (7) Provide for any other element as defined in RCW 90.58.100 deemed appropriate or necessary.

RCW 90.58.020. As to those portions of a master program relating to shorelines of state-wide significance, DOE has full authority, following submission by local government, to develop an alternative master program which provides the optimum implementation of the policy of the SMA to satisfy state-wide interest. In this matter, Clallam County has developed a master program providing for uses it has determined to be appropriate on its shorelines of state-wide significance. The SMP was approved by DOE. There is a presumption that the regulations developed have given the proper preference to uses as provided in RCW 90.58.020.

9. The proposed substantial development is inconsistent with SMP Sections XVI.C.1,4 and Appendix 1 (e and f) because public access is

reduced by the loss of a boat launch in favor of restricted access for marina customers. If the proposal were conditioned for public water and shoreline access, the project would be consistent with these provisions.

10. The Port's attempt to "mitigate" losses caused by the proposed marina do not avoid losses. There will be some losses sustained to the aquatic and birdlife at the Pitship Point. This loss is not prohibited by the SMP or SMA. What is prohibited is uncoordinated, piecemeal development. We cannot say that such prohibited development is extant here although we may have balanced the interests in the SMP differently. Skagit County v. Department of Ecology, 93 Wn.2d 742 (1980).

11. The proposed substantial development has not been shown to be inconsistent with the other provisions of the SMP.

12. The County Commissioners, individually or collectively, did not violate the appearance of fairness doctrine in the proceeding in question.

13. Appellants remaining contentions have been considered and are without merit.

14. The substantial development permit should be further conditioned to provide for public access to the water and shorelines. This may be accomplished by providing for general public use of the marina boat launch facility (or a new boat ramp) to replace the existing boat ramp, and by making specific provision for public use of a suitably designed and constructed picnic area before the marina is operated. As so conditioned, the substantial development would be consistent with the SMA and pertinent SMP provisions. The matter should be remanded to the county for further proceedings.

15. Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted of such.

From these Conclusions the Board enters this

ORDER

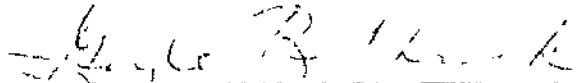
The substantial development permit is remanded for inclusion of provisions for public access to the water and shoreline areas. In all other respects, the permit is affirmed.

DONE at Lacey, Washington this 20th day of October, 1982.

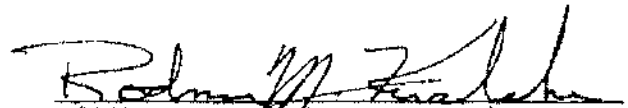
SHORELINES HEARINGS BOARD



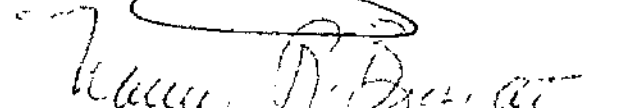
DAVID AKANA, Lawyer Member



GAYLE ROTHROCK, Chairman



RODNEY M. KERSLAKE, Member



NANCY R. BURNETT, Member



RICHARD A. O'NEAL, Member